SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

Nos. 280, 314 and 966

280 ROSCO JONES, *Petitioner,*
v.
CITY OF OPELIKA, *Respondent*

ON WRIT OF CERTIORARI TO SUPREME COURT OF STATE OF ALABAMA

314 LOIS BOWDEN and ZADA SANDERS, *Petitioners;*
v.
CITY OF FORT SMITH, *Respondent*

ON WRIT OF CERTIORARI TO SUPREME COURT OF STATE OF ARKANSAS

966 CHARLES JOBIN, *Appellant,*
v.
THE STATE OF ARIZONA, *Appellee*

APPEAL FROM SUPREME COURT OF STATE OF ARIZONA

Petitioners' SUPPLEMENTAL BRIEF.

HAYDEN C. COVINGTON
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*Petitioners' SUPPLEMENTAL BRIEF

MAY IT PLEASE THE COURT:

This brief is *not filed in lieu* of briefs and motion for rehearing previously filed in these cases but is *in addition* to such.

With the exception of the conclusion reached and a few isolated statements in the majority opinion, it is manifest

* Moving parties herein are jointly referred to as PETITIONERS.

that the disagreement between us is not as to fundamentals and basic law of the Constitution but the difference has resulted from the application of the fundamental principles. This disagreement, we feel, can be and will be entirely obliterated to the end that unity of opinion will result through all returning to fundamentals, to reach a sound, equitable basis for decision in these cases.

To begin with, we all admit that in this nation the people of the United States are the sovereign power—not Congress, not the judiciary, not the executive, and not the several State governments or subdivisions thereof, but "We the people of the United States" are the sovereign power.

In writing the Constitution the sovereign people made the Constitution the supreme law of the land. This is admitted by all of us.

By the Constitution this government of delegated powers was created. By the same instrument, the Constitution, the inherent and fundamental rights of freedom of speech and of press and freedom to worship ALMIGHTY GOD were reserved for and by the people; and thereby originally Congress itself (the *national* legislative department) was estopped and restrained from burdening these rights in any way. By later amendment the same restriction was placed as against the States.

It has ever been the rule that the Federal government and its agencies have been impliedly protected by the Constitution from encroachments, directly or indirectly, upon the exercise of Federal powers of government. By a similar token the State governments have been impliedly protected from similar encroachments by the Federal government. These guarantees of freedom of action within proper fields have been secured by implied provisions in the Constitution. The sovereign *people* by the same compact have likewise set a more certain and express restraint

against both the State and Federal governments by the language used in the First and Fourteenth Amendments.

All will readily admit that a state tax or money exaction upon the exercise of rights by the government delegated to it is void. By stronger force of reason, on the same principle, it results that a tax imposed upon or a money exaction on account of rights expressly reserved to the sovereign people by the First and Fourteenth Amendments must fall.

In the case of the government the right is impliedly guaranteed by the Constitution. As to the sovereign people of the United States, the fundamental right is expressly secured against abridgment of all kinds.

The issues presented in these cases are favorably disposed of by this court in a unanimous opinion of a century ago. We refer to the case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 431. We quoted from this opinion in petitioners' brief filed in the cases of *Murdock et al.* v. *Commonwealth*, Nos. 480-487 October Term 1942, pages 44 to 46, to which reference is here made. In addition to the quotation referred to, the court said:

> "If we apply the principle for which the State of Maryland contends to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy in fact to the States. If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom

house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. *This was not intended by the American people.* They did not design to make their government dependent on the States." [Italics added]

Mr. Justice Nelson in *Collector* v. *Day*, 11 Wall. 113, 124, said:

"And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the [people secured by the Bill of Rights] States depending upon their reserved powers, for like reasons, equally exempt from [State] Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can only exist at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The principle asked to be applied in the cases at bar also finds support in analogy to the cases arising under the "contract clause" where contracts have been protected from burdens in the form of taxation or money exaction. Mr.

Justice Bradley, in *California* v. *Central Pacific Ry. Co.* 127 U. S. 1, 41, said:

> "How can it be possible that a franchise granted by Congress [right secured by First Amendment] can be subjected to taxation by State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the Supreme Law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States [Bill of Rights] may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the [Bill of Rights] powers of the government, and repugnant to its paramount sovereignty. . . . The taxation of the [*exercise* of rights secured by the First Amendment] corporate franchise merely as such, unless pursuant to a stipulation in the [Constitution itself] original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. . . . It is not an idle objection, therefore, made by the company against the tax imposed in the present cases." [Bracketed words added]

It cannot be argued that these cases are not in point, because they cannot be distinguished. In principle they are identical.

If a right secured impliedly to the Federal government by the Constitution cannot be taxed, by double force of

reason a right expressly guaranteed by the Constitution to the sovereign people cannot be taxed.

Regardless of whether *falsely* branded as "peddlers", "canvassers", "sellers", "hawkers" or any other odious, contemptible or uncomplimentary term, if one will stop to think, when disrobed of such popularly-conferred garments, petitioners will be found to be American citizens exercising the fundamental, inherent rights of freedom of press, of speech and of preaching the gospel of God's kingdom, which rights cannot be abridged by taxation or money exaction regardless of what color of glasses any member of the court uses in "viewing" activity of petitioners.

To sustain the taxes here is to destroy the cornerstone of democracy and free government of the people.

Let an ancient sound precedent be noted well: Long before men found it necessary to draw compacts to guarantee their rights the SUPREME LAW of ALMIGHTY GOD of heaven and earth, which in all ages secures the liberty of His covenant people and His ordained ministers, was by Artaxerxes, monarch of the Persian empire (*about* 500 B. C.), construed thus:

> " . . . Also we certify you, that touching any of the priests and Levites, singers, porters, Nethinims, or ministers of this house of God, it shall not be lawful to impose toll, tribute, or custom, upon them. . . ."—See Ezra 7: 11-26, especially verse 24.

When rightly applied here, such rule, we submit, invalidates the license taxes in question.

Respectfully,

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